No. 89-403

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

The Coalition for the Homeless,

Petitioner,

v.

Seawall Associates, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

Richard M. Cooper
(Counsel of Record)
Jeffrey B. Kindler
Williams & Connolly
839 17th Street, N.W.
Washington, D.C. 20006
(202) 331-2466

Frank Michelman
1525 Massachusetts Avenue
Cambridge, MA 02138

Counsel for the Coalition for the Homeless

QUESTION PRESENTED

Whether the mere enactment of a temporary emergency law to reduce imminent homelessness by preventing displacement of low-income tenants and to alleviate current homelessness by preserving for a limited period the existing stock of single-room-occupancy ("SRO") housing amounts to a taking on its face where the law requires that existing SRO units be maintained in habitable condition and continue to be offered to the rental market, or be replaced; and provides for total or partial exemption of buildings that will not produce a return of at least 8.5% of assessed value if operated for continued SRO use.

LIST OF PARTIES TO THE PROCEEDINGS IN THE NEW YORK COURT OF APPEALS

Plaintiffs-Appellants were Seawall Associates; Eastern Pork Products Co.; Durst Partners; Sutton East Associates; 86 Channel Club; Anbe Realty Co.; 459 West 43rd Street Corp.; Jambod Enterprises, Inc.; Mygutt/Perry; Felix Ziade; Rocco Imperial and Testamentum.

Defendants-Respondents were The City of New York, Edward I. Koch, in his capacity as Mayor of the City of New York; Paul A. Crotty, in his capacity as Commissioner of the Department of Housing Preservation and Development of the City of New York; and Charles Smith, in his capacity as Commissioner of the Department of Buildings of the City of New York.

Defendants-Intevenors-Respondents were Richard Wilkerson; Edgar Ferrell; Tom Williams; Danny Sogliuzzo; Nicholas Tallerico; and Coalition for the Homeless.

TABLE OF CONTENTS

TABLE OF CONTENTS CONTINUED

TABLE OF AUTHORITIES

Table of Authorities Continued

Table of Authorities Continued

Table of Authorities Continued

Constitutions

Statutues

Periodicals

Reports

Miscellaneous

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

No._____

The Coalition for the Homeless,

Petitioner,

v.

Seawall Associates, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

Petitioner prays that a writ of certiorari issue to review the judgment of the New York Court of Appeals entered in this case on July 6, 1989.

OPINIONS BELOW

The majority and dissenting opinions in the New York Court of Appeals are at A-1, of the Appendix filed with the petition for certiorari filed by the City of New York (The City of New York, et al., against Seawall Associates, et al., Case No. ____) for review of the same decision below (hereinafter cited as "App."). The opinion of the New York State Supreme Court, Appellate Division, First Department, is at App. A-207, and is reported at 142 A.D.2d 72 (1988). The opinion of the New York State Supreme Court is at App. A-165, and is reported at 138 Misc. 2d 96 (N.Y. Sup. Ct. 1987).

JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C.A. § 1257 (a) (West Supp. 1989), to review the final judgment of the New York Court of Appeals, entered July 6, 1989.

The Court of Appeals decision invalidated an ordinance of the City of New York on the ground that it violates the Fifth and Fourteenth Amendments to the United States Constitution.

STATUTE AND CONSTITUTIONAL PROVISION INVOLVED

Local Law 9, which was declared unconstitutional in the decision below, is reproduced at App. A-253. The Fifth Amendment to the United States Constitution provides, in pertinent part: "nor shall private property be taken for public use, without just compensation."

STATEMENT OF THE CASE

This case arises out of emergency legislation enacted by the City of New York to stem the loss of single room occupancy ("SRO") dwellings -- a vital source of housing for low income single adults. After extensive study, the New York City Council determined that a

drastic decline in the number of these dwellings had created a "serious public emergency" by displacing large numbers of tenants and forcing them into the ranks of the City's homeless. In response, the City enacted Local Law No. 9 of 1987 ("Local Law 9"). Local Law 9 requires, for a stated moratorium period expiring in 1992, that SRO buildings be either maintained and kept on the rental market or replaced if withdrawn from the market. The law provides for partial or full exemption from its requirements upon a showing of financial hardship.

Respondents, a group of real estate developers, challenged the constitutionality of Local Law 9 on its face. With no factual findings, the New York Court of Appeals, two judges dissenting, reversed a unanimous intermediate appellate court and held the law violative of the U.S. and New York

Constitutions on the ground that it takes private property without just compensation.

Petitioner is a public interest organization that provides services to, and represents the interests of, homeless persons and persons at risk of becoming homeless. Petitioner intervened as a defendant in the trial court and participated actively in the proceedings below.

A. The SRO Emergency and the Legislative Response.

Uniquely affordable and suitable for supportive living arrangements for the elderly and disabled, SROs have long provided the housing of last resort for many of New York City's most vulnerable residents, particularly those who are mentally ill.[1] In recent years,

---

[1] SRO residents share bathroom and kitchen facilities. This arrangement creates a community living situation salutary to the frail and isolated population typical of SROs. Twenty-five percent of the residents are sixty years of age or older. Many have no traditional ties to

however, development for luxury housing or commercial space has eliminated thousands of SRO units; and thousands more have been withdrawn from the market, or "warehoused," by owners planning conversion or demolition.[2] As the number of SRO units available for rent has declined drastically, increasing numbers of displaced tenants have been unable to find replacement housing; many have joined the ranks of New York City's homeless. R. 199, 188. The problem has been exacerbated by tenant harassment calculated to reduce the occupancy of SRO buildings in anticipation of development. R. 189, 207-13.

---

family, church or community groups, and are sustained by the relationships they form in SROs. Some SROs have on-site social service providers. Record on Appeal ("R.") 177-78, 683, 710.

2 A real estate industry report estimates that, from 1971 to 1986, seventy-five percent of the buildings erected in midtown Manhattan were developed on sites formerly occupied by SRO properties. R. 185, 203.

Beginning in 1982, the City has taken legislative steps to preserve SRO housing and prevent further displacement of tenants. It has eliminated property tax abatements that had encouraged conversion; it has enacted criminal sanctions against unlawful evictions; and it has funded a special unit to prosecute SRO landlords. R. 222. In 1983, the City prohibited the issuance of permits for alteration or demolition of SRO buildings in the absence of a certification by the Department of Housing Preservation and Development ("HPD") that there has been no harassment of tenants during the preceding three years. N.Y.C. Admin. Code. § 17-198.

These measures proved inadequate to the crisis. In 1985, the City enacted Local Law No. 59. In its statement of legislative intent, the Council explained:

> that a serious public emergency exists in the housing of a

> considerable number of persons which emergency has been created by the loss of single room occupancy dwelling units housing lower income persons; that the loss of such housing units has caused serious hardship for occupants who have been forced to relocate; that adequate housing resources to effectuate relocation of such occupants do not currently exist; that many of such occupants are elderly and infirm persons of low income who are incapable of finding alternative housing accommodations; that a considerable number of such persons have become part of a growing homeless population; [and] that the intervention of the city government is necessary to protect such housing stock by imposing a moratorium on conversions, alterations and demolitions of single room occupancy multiple dwellings . . . .

Local Law No. 59, § 1 (1985). Supplemental Record (Record, Vol. 3) 34. That law imposed a temporary moratorium on the conversion, alteration or demolition of SRO dwellings. It also authorized the preparation of an independent study to determine "the best means of making available single room occupancy

dwelling units and other housing for low income persons." Id.

The resulting study, Blackburn, Single Room Occupancy in New York City (Jan. 1986) (the "Blackburn Report"), is a detailed analysis of the loss of SROs in the context of the low-income housing crisis.[3] The report concluded: "In the absence of further legal restraints, there will be a substantial loss of low-cost rooming units when the moratorium is over." R. 749. The report urged that the City "now act quickly to insure that the low-cost housing provided by single room units is preserved and expanded." R. 680. It recommended that the City extend the temporary ban on conversion, alteration or demolition and also impose a ban on warehousing "to prevent these single room units from being forever lost to the inventory." R. 730. It

---

[3] The Blackburn Report is reproduced at R. 674-808.

also made specific recommendations to expand the SRO housing stock.

In response to the Blackburn Report, the City Council adopted Local Law No. 22, which continued the moratorium on SRO conversions through the end of 1986 and added an anti-warehousing provision requiring that vacant units be made habitable and offered for rent.[4] The extension of the moratorium was

---

[4] The Blackburn Report found that, of the approximately 64,000 SRO units remaining in New York City, some 6000 were vacant, largely due to warehousing. R. 678. In enacting Local Law No. 22, the City Council found that

> prior to and during the moratorium been widespread withdrawal of single room occupancy dwelling units from the rental market, which has further reduced an already inadequate supply of such units, that this practice has contributed to the increasing homeless population, and that in order to further the objectives of local law fifty-nine and to maintain the availability of single room occupancy dwelling units for low income persons during the serious public emergency declared in such law, it is necessary and in the public interest to prevent owners from warehousing single room occupancy dwelling units during the moratorium.
>
> Local Law No. 22, § 1 (1986)(R. 35).

intended to allow time for consideration of the Blackburn Report and for the development of a detailed response to the SRO emergency. R. 35.

B. Local Law 9.

Immediately upon expiration of the moratorium, the City Council adopted Local Law No. 9 of 1987 -- a five year plan of regulation of SRO properties -- to address the serious public emergency created by the continued loss of SRO housing and the resulting increase in homelessness among former SRO residents.[5] The law restricts the conversion, alteration and demolition of most SRO dwellings for five years. N.Y.C. Admin.

---

[5] The regulatory scheme was originally enacted as Local Law No. 1 on February 2, 1987. It was subsequently amended and re-enacted as Local Law No. 9 on March 5, 1987.

Code § 27-198.2.[6] During that period, the law requires SRO owners to maintain units in a habitable condition and to make a good faith effort to rent them. Id. § 27-2150.2152.[7]

---

6 The law is carefully designed to apply only to the remaining stock of SRO housing subject to loss through redevelopment. Thus, it exempts buildings that do not actually offer SRO housing, that have been vacant for a certain period of time, that are owned by the government, that are part of an approved project for the rehabilitation and preservation of SRO dwellings, or that contain 24 units or less and are intended for use as the owner's home. See N.Y.C. Admin. Code §§ 27-198.2(d)(1)(a), (b) and 27-198.2(b)(1)(d), (g).

7 Local Law 9 is only part of the City's effort to address the problem of homelessness. The City has launched a ten-year $5.1 billion plan for housing, which "provides funds for the treatment of every vacant and occupied City-owned building and targets over 85 percent of its funds and units to families earning less than the City's median income." City of New York, Executive Budget Fiscal Year 1990, Message of the Mayor 208 (1989). Funds for the plan come from the City, the State of New York, and other public sources. Id. The City's fiscal 1990 Capital Budget provides $908 million ($664 million in City Capital funds) to support the ten-year plan. Id. 209. Thus, the burden of addressing homelessness in New York City does not rest solely, or even principally, on the private sector.

The law does not prohibit owners of SRO housing from developing their properties. SRO owners may withdraw the units from the market by providing for their replacement. Id. § 27-198.2(d)(4)(a). Replacement can take either of two forms: (1) payment to an SRO housing fund of the cost of replacing withdrawn units, currently set at $45,000 per unit (the funds would be used to preserve, acquire, and develop housing affordable by low and moderate income persons); or (2) provision of replacement units through acquisition, rehabilitation, or new construction (replacement units would be sold or leased to a not-for-profit organization for operation).[8]

---

8 Because contributions to the fund may not result in immediately available alternative units, an owner of a building in which fifty percent or more of the SRO units are occupied may obtain an exemption for the occupied units by obtaining or developing actual replacement units. See N.Y.C. Admin. Code, §27-198.2(d)(4)(a). Where less than fifty percent of the units are occupied, an owner wishing to take advantage of the replacement or

Local Law 9 establishes an administrative procedure under which the Commissioner of HPD may grant a hardship exemption when an owner shows that, with SRO use, a property cannot earn a reasonable annual rate of return, defined as eight and one-half percent of its assessed value; and that utilization of the replacement provisions would substantially impair the feasibility of redevelopment. Upon such showing, HPD may eliminate or reduce the amount to be contributed to the fund or the number of replacement units to be provided, in order to withdraw SRO units from the market. Id. at §27-198.2(d)(4)(b).[9]

---

buy-out options must relocate the remaining tenants in comparable housing, at comparable rent in the same borough of the City. Id. §27-198.3(a).

9 An owner may not make use of this exemption where his or her inability to earn a reasonable return is the consequence of intentional acts of mismanagement, designed to destroy the property's

C. Proceedings Below.

The trial court consolidated three related actions brought by respondents and converted their motions for preliminary injunctive relief to motions for summary judgment. 138 Misc. 2d 96 (N.Y. Sup. Ct. 1987).[10] Without holding an evidentiary hearing, it granted summary judgment on the ground that Local Law 9 on its face violated respondents' due process rights and constituted a taking of their property without just compensation. The court enjoined the City from implementing or enforcing the law.

---

value as an SRO dwelling. N.Y.C. Admin. Code §27-198.2(d)(4)(b).

10 Respondents had earlier brought an action to enjoin enforcement of Local Law No. 22. Seawall Associates v. City of New York, 134 Misc. 2d 187 (N.Y. Sup. Ct. 1986). The trial court granted relief; but, instead of appealing, the City enacted Local Law No. 1 (and, later, Local Law 9), which in significant respects differed from those provisions in Local Law No. 22 that had been held unconstitutional.

The Appellate Division unanimously reversed, and upheld the constitutionality of Local Law 9 in all respects. 142 A.D.2d 77 (1988).

The New York Court of Appeals, two justices dissenting, reversed. It held Local Law 9 to be "facially invalid as both a physical and regulatory taking" in violation of both the U.S. and New York State Constitutions.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW IS NOT SUPPORTED BY AN ADEQUATE AND INDEPENDENT STATE LAW GROUND

The opinion of the New York Court of Appeals invoked no independent state law ground for its decision. The opinion contains no separate discussion of New York, as distinguished from federal, law. Indeed, the court expressly stated: "In view of this

holding, we need not decide the extent to which, if at all, the protections of the 'takings clause' of the New York State Constitution differ from those under the Federal Constitution." App. A-63 n.15. By any measure -- quantitative or qualitative -- the court relied primarily on federal, rather than state, law.

The opinion below has three brief references to the New York Constitution, App. A-8, A-12, A-62-63. All three were in conjunction with parallel references to the United States Constitution, and were made in conclusions from a single legal analysis principally of decisions of this Court. Thus, the references to the New York Constitution were not independent of the court's interpretation of the United States Constitution.

In these circumstances, the decision below does not rest on an adequate and

independent state law ground. Asarco, Inc. v. Kadish, 109 S. Ct. 2037, 2049 (1989); Harris v. Reed, 109 S. Ct. 1038 (1989); Michigan v. Long, 463 U.S. 1032 (1983).

II. THE DECISION BELOW IS CONTRARY TO DECISIONS OF THIS COURT.

The decision below rests on three conclusions: that (1) Local Law 9 works a physical taking of SRO properties because it limits the owners' right to exclude strangers from their properties; and that it also works a regulatory taking because (2) it denies the owners any economically viable use of the properties and because (3) it does not substantially advance a legitimate governmental interest. In all three of these crucial respects, the court's conclusions and its reasoning are contrary to decisions of this Court and are otherwise incorrect.

A. No Physical Taking.

The right to exclude others is obviously essential to any real enjoyment of premises devoted to private personal use by their owners. E.g., Kaiser Aetna v. United States, 444 U.S. 164 (1979); Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987). In those cases, a physical taking occurred because governmental action imposed unwanted members of the public upon property reserved by its owners for personal private use. In Nollan, the Court quoted from Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 433 (1982), itself quoting Kaiser Aetna, 444 U.S. at 176, a passage emphasizing the importance of the right to exclude others, but the Nollan Court introduced the passage with its own words of explanation: "We have repeatedly held that, as to property reserved by its owner for private use . . . ." 483 U.S. at 831

(emphasis added). The Court thus recognized that the significance of the right to exclude others depends on the "privacy" of the use for which the property is adapted and held.

This Court has accordingly and repeatedly held that, in the case of property configured and used for public accommodation, a law authorizing physical entry by particular third parties not chosen by the owner, but otherwise in keeping with property's established use as a place of public accommodation, does not constitute a physical or other taking. Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 258-61 (1964); Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980). In Pruneyard, the Court commented that, in the circumstances presented, "the fact that [third parties] may have 'physically invaded' appellants' property cannot be viewed as determinative." 447 U.S. at 84. The reason

for that conclusion was that the owners had "failed to demonstrate that the 'right to exclude others' is so essential to the use or economic value of their property that the state-authorized limitation of it amounted to a 'taking.'" Id.

The plain message of these holdings is that, where personal privacy is not affected, limitation by government of rights to exclude others is not a per se or physical taking. Whether such a limitation then constitutes a taking depends on further analysis of the property's economic value. That kind of analysis relates not to the issue of physical taking, but rather to that of regulatory taking (discussed infra).

Here, the buildings subject to Local Law 9 are not and have never been reserved by their owners for their personal private use. Therefore, for these owners, the right to

exclude members of the public is not essential, as it was for the owners in Kaiser Aetna and Nollan.

To conclude that there is no physical taking in this case, the Court need not find that all SRO properties subject to Local Law 9 are already subject to exactly the same kinds and degree of public service obligations as the motel in Heart of Atlanta and the shopping center in Pruneyard. It is enough to see that, like a motel and a shopping center, and unlike a beach house or the marina in an exclusive waterfront development, an SRO building is designed for commercial dealings with members of the public at large. Thus, the entry of tenants into these buildings, pursuant to Local Law 9, does not constitute a taking because such entry serves the very purpose for which the buildings are currently configured and for which they have, in fact,

been used. This reasoning explains why there were not physical takings in other cases involving legally compelled entry or presence of tenants on rental premises, e.g., Block v. Hirsh, 256 U.S. 135 (1921)(Holmes, J.); Bowles v. Willingham, 321 U.S. 503 (1944).[11]

---

11 The court below sought to distinguish between a "stranger" to the rental premises seeking a tenancy there and a previously consensual tenant holding over after the expiration or termination of his lease. App. A-16-27. The proposed distinction is not responsive to any difference in circumstances that is relevant to the law of takings. With respect to contract or consent, there is no relevant difference: the holdover has no greater right based on contract or consent than does the "stranger." Moreover, the presence of the holdover may in some cases be more obnoxious to the landlord than that of the "stranger," especially where the landlord has sought to exercise a contractual right to terminate and evict. Society may have a somewhat greater interest in protecting an existing tenancy than in initiating a new one, and thus may give current tenants protections against both landlords and prospective tenants, but this societal interest ought not give a landlord greater constitutional rights against a new entrant than against a holdover, especially where there is no competition between new entrant and current tenant and therefore the landlord is not a proxy for the current tenant.

Loretto v. Teleprompter Manhattan CATV Corp. does not support a finding of a physical taking here. First, on the facts, there simply is no "permanent physical occupation," Loretto, 458 U.S. at 426. There is no "placement of a fixed structure on land or real property," id. at 437. There is no introduction onto the affected properties of exogenous material that permanently occupies them, as in, e.g., Pumpelly v. Green Bay Co., 80 U.S. (13 Wall.) 166 (1871)(permanent flooding), discussed at 458 U.S. at 427. There is no disruption of the current use of property due to the physical activities of government employees, as in United States v. Causby, 328 U.S. 256 (1946)(low level airplane flights), discussed at 458 U.S. at 430-31. There is no "actual taking of possession and control" by the government, as in United States v. Peewee Coal Co., 341 U.S. 114, 116

(1951), quoted at 458 U.S. at 431. In sum, the governmental action here does not constitute a physical taking "under the traditional test," 458 U.S. at 438.

Second, the Court in Loretto expressly distinguished the governmental action held to constitute a taking in that case from laws that regulate relationships, including right-of-occupancy relationships, between landlords and tenants and that do not "authorize the permanent occupation of the landlord's property by a third party." 458 U.S. at 440. Local Law 9 does regulate the relationship between landlords and tenants, and it does not authorize occupation of the premises by the person or property of any stranger to the landlord-tenant relationship.

Third, the instant case, unlike Loretto, does not involve a requirement that a property owner allow the permanent placement on his

premises of any physical object that he does not own. Any improvements needed to comply with the requirement to maintain SRO units in habitable condition will be the property of the owners. See 458 U.S. at 440 n. 19.

Finally, Loretto did not "question the . . . substantial authority upholding a State's broad power to impose appropriate restrictions upon an owner's use of his property." 458 U.S. at 441 (emphasis in original). Here, Local Law 9 requires that SRO buildings be continued in the use to which they have historically been devoted and for which they are still suited. Contrary to the decision below, under Loretto and other decisions of this Court, the question whether this regulatory effort constitutes a taking cannot be answered by calling it a physical taking, but only by analyzing the factors relevant to the doctrine of regulatory takings.

B. No Regulatory Taking.

Three factors guide analysis of whether a regulatory action constitutes a taking: the character of the action, its economic impact on the claimant, and the extent to which it interferes with investment-backed expectations. E.g., Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124 (1978); Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1005 (1984).[12] The court below failed to analyze properly the character of Local Law 9, and it held erroneously that its mere enactment constitutes a regulatory taking because it denies the owners economically

---

12 Effect on investment-backed expectations commonly is a factor in the analysis of regulations alleged to be takings. Here, however, as the court below correctly noted, App. A-31 n.6, that factor cannot be assessed because the challenge to the law was on its face rather than as applied. Moreover, the record contains no evidence and no findings of fact as to the legitimate expectations of current owners of SRO buildings.

viable use of their properties, and does not substantially advance a legitimate governmental interest. In reaching each conclusion, the court misread prior decisions of this Court.

1. Local Law 9 is a Landlord-Tenant Law, Intended to Reduce Imminent Future, and Alleviate Present, Homelessness

Local Law 9 falls within a long tradition of temporary measures enacted to address emergencies in the supply of housing -- a form of land-use regulation consistently upheld by this Court in an unbroken line of decisions over more than sixty years. "[A] public exigency will justify the legislature in restricting property rights in land to a certain extent without compensation. . . . Housing is a necessary of life. All the elements of a public interest justifying some degree of public control are present." Block v. Hirsh, 256 U.S. 135, 156 (1921)(Holmes,

J.)(war-time tenancy-extension and rent-control law). See also, e.g., Marcus Brown Holding Co. v. Feldman, 256 U.S. 170 (1921)(Holmes, J.)(same); Edgar A Levy Leasing Co. v. Siegel, 258 U.S. 242 (1922)(emergency rent control); Bowles v. Willingham, 321 U.S. 503 (1944)(war-time rent control); Woods v. Cloyd W. Miller Co., 333 U.S. 138 (1948)(post-war rent control); Fresh Pond Shopping Center, Inc. v. Callahan, 464 U.S. 875 (1983)(restrictions on removal of apartments from rental market); see also Pennell v. City of San Jose, 108 S. Ct. 849, 859 n.8 (1988)("Particularly during a housing shortage, the social costs of the dislocation of low-income tenants can be severe.")(rent control law that takes into account hardship to tenant). In assessing the character of Local Law 9, the court below virtually ignored this line of decisions.

The distinctive features of Local Law 9 have support in prior decisions of this Court in analogous circumstances. The ordinance, by its explicit terms, is temporary. Cf. Block v. Hirsh; Bowles v. Willingham.[13] The requirement to maintain habitability is analogous to the requirement to maintain historical landmarks "in good repair" upheld in Penn Central, 438 U.S. at 111-12, and the requirement to install sprinklers in pre-existing buildings upheld in Queenside Hills Realty Co. v. Saxl, 328 U.S. 80 (1946). The requirement to accept unwanted tenants (subject to the owner's right to reject

---

13 In this respect, Local Law No. 9 imposes a less severe restriction on property than did the permanent restrictions on eviction upheld in Fresh Pond Shopping Center, Inc. v. Callahan, 464 U.S. 875 (1983)(dismissing appeal for want of a substantial federal question). See id. at 878 (Rehnquist, J., dissenting)("[a] limit in time, to tide over a passing trouble, may well justify a law that could not be upheld as a permanent change")(quoting Block v. Hirsh, 256 U.S. at 157).

particular individuals on appropriate grounds) is analogous to the requirements in, e.g., Block v. Hirsh (holdover tenants), Marcus Brown Holding Co. (same), and Heart of Atlanta Motel (black patrons of motel). The restriction of opportunities for development is analogous to the effect of New York City's Landmarks Preservation Law, upheld in Penn Central, 438 U.S. at 129-31. The requirement to continue in the operation of an SRO building is analogous to the restrictions on evictions upheld in Fresh Pond. Most fundamentally, the purpose of Local Law 9 -- to reduce imminent future homelessness and alleviate present homelessness -- is analogous to the purposes of the laws upheld in, e.g., Block v. Hirsh and Edgar A. Levy Leasing Co. See also Home Building & Loan Association v. Blaisdell, 290 U.S. 398 (1934)(Hughes, C.J.)(statutory extension of period for

redemption of defaulted mortgage). These cases demonstrate that, in prior periods of widespread actual or threatened homelessness, this Court has permitted states and localities to pursue energetic and innovative temporary measures to address the problem.

2. No Denial of Economically Viable Use

The court below made essentially two arguments for its conclusion that Local Law 9 deprives owners of SRO buildings of economically viable use of their buildings. First, it stated that the owners "are forced to devote their properties to another use which . . . bears no relation to any economic purpose which could be reasonably contemplated by a private investor." App. A-36. For that reason, the court held, the law abrogates or substantially impairs the owners' rights to possess, use, and dispose of their properties. Id. at A-34-36. Second, expressly employing

the methodology of "conceptual severance,"[14] the court held that the law totally destroys the right to convert SRO properties to different uses, and that "the permanent abrogation of one of those rights without regard to its comparative value in relation to the whole . . . may well be sufficient to constitute a taking," id. at A-41, and does so here. Each argument reflects a rejection of certain of this Court's prior decisions and a misapplication of others to the circumstances of this case.

---

14 "Conceptual severance" is the technique of analyzing a party's total package of rights and liberties with respect to particular property into distinct interests and deciding whether a taking has occurred by focusing on the effect of governmental action on a particular interest by itself, rather than on the effect of the governmental action on the party's rights in the property as a whole. See Radin, The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings, 88 Colum. L. Rev. 1667, 1676 (1988).

First, Local Law 9 requires owners to continue temporarily the existing use of SRO buildings, which have been highly regulated for many years. Therefore, it is flatly incorrect to say that the law requires a use that "bears no relation to any economic purpose which could reasonably be contemplated by a private investor." See Penn Central, 438 U.S. at 136. Moreover, the law does not destroy the right to convert; it merely conditions it on replacement of withdrawn units.

Second, the court's prognostications about economic viability defy "this Court's oft-repeated admonition that the constitutionality of statutes ought not be decided except in an actual factual setting that makes such a decision necessary." Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 294 (1981). "Adherence

to this rule is particularly important in cases raising allegations of an unconstitutional taking of private property," in view of the "essentially ad hoc, factual inquiries" relevant to the analysis, particularly questions regarding "the economic impact of the regulation." Id. Accordingly, where, as here, a land-use regulation is challenged on its face, "the only issue properly before the [court] is whether the 'mere enactment' of the [regulation] constitutes a taking." Id., quoting Agins v. City of Tiburon, 447 U.S. 255, 260 (1980). See generally Pennell, 108 S. Ct. at 856-57; Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 494-95 (1987).

Ignoring these admonitions, the court below relied on its own arm-chair factual assessments both of the economic viability of continued SRO use of the buildings and of the

likely returns that owners would receive upon sale or development. See App. A-26. These speculations have no basis in the record. Such disregard for this Court's strictures in Hodel, Agins, Pennell, and Keystone against facial invalidation of regulations as takings requires swift correction.

Third, the Court of Appeals misconstrued the economically-viable-use test. The test is not satisfied by mere diminution in value, even if severe. E.g., Penn Central, 438 U.S. at 125; Keystone, 480 U.S. at 488-89 n.18; Goldblatt v. Town of Hempstead, 369 U.S. 590, 592 (1962). There is a taking only if the governmental action leaves no economically viable use. See, e.g., Penn Central, 438 U.S. at 124-38; Agins, 447 U.S. at 260; Keystone, 480 U.S. at 493-99.

Here, although the court below concluded that continued use of the SRO buildings for

SRO use is less profitable than alternative uses, it did not address the only legally relevant question: whether the ordinance permits no economically viable use. The court did acknowledge that "[i]t is highly unlikely that any of the properties, which must be kept fully rented, will ever produce less than 8-1/2% assessed value, even though the properties are subject to rent control and rent stabilization." App. A-56-57. It did not determine, however, whether that rate of return is insufficient for economic viability,[15] nor did it consider whether the cost of replacing withdrawn units would

---

15 Nothing in this Court's prior decisions suggests that that rate of return is insufficient. Indeed, the court below had, itself, previously upheld against constitutional attack a rent-control law that provided for that very rate of return; and this Court found no substantial federal question. Benson Realty Corp. v. Beame, 50 N.Y.2d 994, 431 N.Y.S.2d 475, 409 N.E.2d 948 (1980), app. dismissed, sub nom. Benson Realty Corp v. Koch, 449 U.S. 1119 (1981).

necessarily make any redevelopment of SRO properties unprofitable; and of course, it had before it no evidence or findings of fact that would support any such determinations. For that reason, the court's conclusion that the law denies to owners of SRO properties all economically viable use of their property cannot stand.

Fourth, like its analysis of economic viability, the court's foray into conceptual severance adopts a methodology repeatedly rejected by this Court. E.g., Penn Central, 438 U.S. at 130 ("'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated."); Andrus v. Allard, 444 U.S. 51, 65-66 (1979)(""[T]he denial of one traditional property right does not always amount to a taking. At least where an owner

possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety."); Keystone, 480 U.S. at 497-502.

The court below relied for its methodology on Hodel v. Irving, 481 U.S. 704 (1987), and Nollan. App. A-40-43. Neither decision supports it.

In Irving, the Court cited both Penn Central and Keystone, inter alia, as establishing "the framework for examining the question of whether a regulation of property amounts to a taking." 481 U.S. at 713. The Irving Court also implicitly rejected conceptual severance when it commented that Congress might abolish the right of intestate descent, 481 U.S. at 718. The flaw in the statute at issue was that it abolished both descent and devise, and, furthermore, did so

"even in circumstances when the governmental purpose sought to be advanced, consolidation of ownership of Indian lands, does not conflict with the further descent of the property," id. Moreover, Justice Scalia (who later wrote for the Court in Nollan) noted in his concurring opinion that "the balance between rights taken and rights left untouched . . . is determinative." 481 U.S. at 719. That balancing approach is the exact opposite of conceptual severance.

Even if Irving were read as authorizing a form of conceptual severance, that form would not apply here. The Court emphasized that it was the "complete abolition" of the right to pass property at death, in both its forms (devise and descent), that constituted the taking. 481 U.S. at 716-17. What made the claim of a taking compelling was the perception that a right in some way to pass on

property at death is essential to ownership as traditionally and commonly understood: if an individual owner cannot pass on property at death, then, in some sense crucial to ordinary understanding, he or she does not own it. If Irving authorizes conceptual severance, it does so only in the limited circumstances where governmental action deprives an owner of rights that go to the heart of the common understanding of ownership, as do enforced physical occupations of property held for personal private use and total deprivations of the right to pass on property at death. The property interests affected by Local Law 9 are not of that character. A temporary requirement that an owner of rental property continue to rent it for an adequate return, unlike the statute in Irving, does not violate the common sense understanding of ownership.

Nor does the Court's opinion in Nollan endorse conceptual severance. Although the regulatory action at issue was analogized to the taking of an easement, the constitutional flaw was not that it totally deprived the owners of a conceptually severed interest, but that by granting public access to a parcel of land reserved for personal private use it severely hindered enjoyment of the parcel as a whole; and it did so, furthermore, by attaching to the grant of a permit a condition that "utterly fail[ed] to further the end advanced as the justification for" the condition, 483 U.S. at 837.

Conceptual severance is potentially a cancer in the jurisprudence of takings. This case presents an opportunity for the Court to extirpate it and prevent its spread.

2. Local Law 9 Substantially Advances A Legitimate Governmental Interest

The court below relied on Nollan to hold that an especially "close nexus" is required between a legitimate governmental interest and the regulatory measure at issue. Applying that test, it held that Local Law 9 fails to advance substantially a legitimate governmental interest. Nollan, however, provides no support for the court's analysis.

It is not clear whether Nollan created any new generally applicable requirement of a particularly close nexus between governmental ends and means. First, the case, itself, was decided under the test of whether the permit condition was "reasonably related to the public need . . . ." Id. at 438. Second, the decision turned on the perpetration, in effect, of a physical taking. Had the Coastal Commission simply expropriated outright the easement of access, its action plainly would have been a physical taking. 483 U.S. at 831-

32. The Commission structured its action, however, as a condition on a permit, and argued that therefore it should not have to pay compensation. The Court's responsive demand for a nexus between the access condition and the asserted regulatory purpose was a demand for assurance that a regulatory condition was not being used manipulatively to avoid paying for what would otherwise be a physical taking. Any general extension to economic regulatory statutes of a "close nexus" requirement or a similarly strict standard of review of governmental means and ends would involve an overruling of, e.g., Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926)("If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control."), and, as the dissenters below suggested, App. A-67-70, a

return to Lochner v. New York, 198 U.S. 45, 57-58 (1905) ("The act must have a more direct relation, as a means to an end . . . .").

Third, the permit condition was imposed by an administrative rather than a legislative body. Language in Nollan suggestive of a special nexus requirement may relate only to that context, and may not necessarily extend to the evaluation of legislation. Legislative bodies traditionally are given more deference with respect to means and ends than are administrative bodies. See, e.g., Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Automobile Insurance Co., 463 U.S. 29, 43 n.9 (1983).

Moreover, the issue in Nollan required no expertise and no complex analysis. The Court held that the permit condition "utterly fail[ed] to further the end advanced as [its]

justification . . . ." 483 U.S. at 837. See also id. at 838-39.

Here, on an issue that is complex, and that requires expertise, the court substituted its empirical judgment for the carefully considered findings of the New York City Council. It determined that the law "would do little to resolve the homeless crisis," App. A-47, and it characterized the relation between the law and the problem of homelessness as "indirect at best and conjectural," id. at A-49. Even if the court's views on this empirical question could be considered more reliable than those of the legislative body, they would still furnish no basis for holding the law unconstitutional. If every statute that restricts property rights and does only "little" to resolve a major and complex societal problem were a taking, very little state and local land-use

regulation would survive. The standard imposed by the court below is contrary to Nollan and to numerous decisions of this Court, cited supra, upholding regulatory actions against takings challenges.

Finally, it is self-evident that, by preventing displacement of tenants and preserving existing SRO units, the law substantially advances the legitimate governmental interests of reducing imminent future homelessness and alleviating current homelessness. Preserving the cheapest form of housing and requiring it to be offered on the rental market is a straightforward, direct way to protect those most likely to become homeless and to make additional housing units available to those who are now homeless.

The City Council, unlike the court below, correctly read the Blackburn Report's conclusion that, although the long-term

solution to the problem of homelessness in New York City will involve far more comprehensive action than Local Law 9, such a law is necessary to deal effectively with the immediate problem of displacement and resulting homelessness among those dependent on SRO housing and as a stopgap while a longer-term program is developed. R. 731-32.

In sum, the court below erred in applying the nexus requirement of Nollan, and a decision is needed by this Court to correct that error and give guidance to other courts that will consider similar issues.

II. THE DECISION BELOW CONFLICTS WITH OTHER LOWER COURT DECISIONS

In recent years, local legislative efforts to address homelessness have focused in part on the disappearance or warehousing of low income rental units due to the workings of the real estate market in large and small

cities. Several of those efforts have been tested in the courts, and the results are in conflict with the decision below.

In Help Hoboken Housing v. City of Hoboken, 650 F. Supp. 793 (D.N.J. 1986), the city had determined that "the elimination of a substantial portion of the existing affordable rental housing stock, and insufficient new construction of affordable rental housing . . . have caused a substantial and increasing shortage of rental housing affordable by families of low and moderate income." See 650 F. Supp. at 796. The warehousing of vacant units was found to cause "severe economic and physical hardships to tenants . . . ." Id. Therefore, the city enacted an ordinance that prohibited the withholding of rental units from the market, with certain exceptions. Rejecting some of the very arguments accepted by the court

below, the court in Help Hoboken found that the ordinance did not constitute a taking.

Similarly, in Terminal Plaza Corp. v. City & County of San Francisco, 177 Cal. App. 3d 892, 223 Cal. Rptr. 379 (1986), the court upheld against a takings challenge an ordinance that severely restricted the conversion of residential hotels to other uses. In effect, it permitted conversion only if an owner made a one-for-one replacement of the units being converted. 223 Cal. Rptr. at 381. The owner's argument that the ordinance constituted a taking was rejected. Id. at 390-91.

Finally, in Troy, Ltd. v. Renna, 727 F.2d 287 (3d Cir. 1984), the court upheld against constitutional attack a New Jersey statute that extended tenancies of eligible "senior citizens" and their surviving spouses and eligible "disabled" persons for up to 40 years

(beyond a notice period and stays authorized by other statutes) after a building had otherwise been converted to condominiums. The court held that the statute served "a broad remedial purpose" and was not a taking.

See also Nash v. City of Santa Monica, 37 Cal. 3d 97, 207 Cal. Rptr. 285, 688 P.2d 894, 897-98 (1984)(upholding, against due process claim of right to go out of business, ordinance that prohibited demolition of rental housing unless stringent conditions were met); Flynn v. City of Cambridge, 418 N.E.2d 335 (Mass. 1981)(upholding against takings challenge ordinance providing that where rental unit is converted to condominium it may not be withdrawn from rental market; same ordinance at issue in Fresh Pond).

III. LOCAL LAW 9 IS A POTENTIAL NATIONAL MODEL FOR TEMPORARY EFFORTS TO ADDRESS HOMELESSNESS, AND ITS CONSTITUTIONALITY SHOULD BE DECIDED BY THIS COURT

Homelessness is a growing problem in many cities across the United States. Its origins are complex, and may vary from one community to another. While comprehensive solutions are under consideration, something must be done to address the plight of the currently homeless and the imminently homeless.

Local Law 9 is a potential model approach to that short-term phase of the problem. The usefulness of that model would be destroyed, however, if the decision below were to be the last word on its constitutionality. The financial risks to local governments from enacting legislation subsequently declared to be a taking were greatly increased by this Court's decision in First English Evangelical

Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987). While it remains unreviewed by this Court, the decision below will provide a powerful disincentive to enactment by other local governments of legislation similar to Local Law 9. Thus, the issue presented in this case is national in scope; and it warrants the granting of the writ.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari in this case.

Respectfully submitted,

Richard M. Cooper

Richard M. Cooper (Counsel of Record)
Jeffrey B. Kindler

Williams & Connolly
839 17th Street, N.W.
Washington, D.C. 20006
(202) 331-2466

Frank Michelman
1525 Massachusetts Avenue
Cambridge, MA 02138

Counsel for the Coalition for the Homeless

Dated: September 6th, 1989.